No. 87-1344

IN THE

Supreme Court of the United States

October Term, 1987

EDWIN MEESE III, Attorney General of the United States, *et al.*,
Petitioners,

v.

JACK ABBOTT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the constitutionality of prison regulations and policies governing the receipt of publications by federal prisoners should be evaluated under the First Amendment standard established in Procunier v. Martinez, 416 U.S. 396 (1974), so that the district court should on remand determine (1) whether important and substantial governmental interests in security, order and rehabilitation are furthered by the federal prison regulations and practices at issue; and (2) whether the limitations of First Amendment freedoms are no greater than necessary or essential to protect the particular governmental interest involved?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

BOOKS

The Respondents, Jack Abbott, et. al., respectfully request that this Court deny the petition for the writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. That opinion is reported at 824 F.2d 1166.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1987. Petitioners' Appendix (hereinafter P.A.) at 50a-51a. A Petition for Rehearing was denied on October 13, 1987. P.A. at 52a. A Petition for the Writ of Certiorari was filed on February 10, 1988. On February 29, 1988, the Clerk of the Supreme Court, pursuant to Rule 29.3, extended the time within which to file a Brief in Opposition to the Petition to April 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case was filed in 1973 on behalf of a class of all federal prisoners challenging the Federal Bureau of Prisons' ("Bureau") policies and practices with respect to receipt of publications and correspondence. Brought under 28 U.S. §1331, it sought declaratory and injunctive relief for the deprivation of rights under the First, Fifth and Sixth Amendments to the United States Constitution. Class certification on the injunctive claims was granted on June 7, 1974. In 1978 three publishers intervened as plaintiffs: Weekly Guardian Associates, publisher of The Guardian magazine; Prisoners' Union, publisher of The Outlaw magazine; and Revolutionary Socialist League, publisher of The Torch magazine.[1]

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[1] In addition, eighty-two named plaintiffs also sought damages for discrete incidents involving violation of these rights occurring at Bureau facilities. In 1973, the damage claims were severed from the requests for declaratory and injunctive relief. These claims are still pending.

At the 1981 trial on the equitable claims, the plaintiffs introduced into evidence forty-six books and publications that were rejected from various federal prisons. Plaintiffs introduced the testimony of six experienced corrections experts, an expert in correctional psychiatry and Dr. Marvin Wolfgang, a nationally known penologist. The evidence demonstrated, often from prison officials' own admissions that these specific items did not pose any threat to prison security. See n.6 below for examples from that evidence. The Bureau's case consisted of documentary material and the testimony of prison officials and of one outside corrections expert.

The district court's memorandum opinion was filed on September 13, 1984.

P.A. at 26a-49a. The district court rejected a facial attack on the publication regulations and upheld them as necessary to prevent prisoners from reading "potentially disruptive" materials. P.A. at 31a. The rejection of the forty-six specific publications was upheld en masse, without findings that any of the rejected materials posed a threat to security if read by federal prisoners. P.A. at 30a-31a.[2] The court accepted the proposition

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[2] In fact, the record below is devoid of evidence of actual security threats created by publications read by prison inmates. The Petition attempts to remedy this omission by its reference to the recent disturbances among Cuban prisoners in two federal prisons. Pet. at 18. This contention is, of course, unsupported by the record. Indeed, the Court can take judicial notice of the fact that the Bureau blamed public news broadcasts, for triggering the disturbances. The Bureau regulations at issue here have no application to the possible censorship of such broadcasts. Accordingly, the Bureau regulations at issue are irrelevant to the Mariel Cuban prison disturbances and the holding of the Court below can not increase the risk of such incidents.

that prison wardens are entitled to "wide discretion" in content-based censorship pursuant to a "generalized" regulation and, in effect, that their decisions are subject to little or no judicial review. P.A. at 31a-32a. The court next upheld the Bureau's practice of excluding an entire publication when only portions are deemed offensive on the grounds that the alternative practice of deleting the objectionable material suggested by plaintiffs would cause prisoner discontent. P.A. at 34a. The district court asserted that its conclusions were grounded in the test established in the line of cases beginning with Pell v. Procunier, 417 U.S. 817 (1974), P.A. at 46a-47a, but did not explain how it applied the Pell test to reach its conclusions.[3]

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[3] The district court made other rulings that were not the subject of the appeal in the Court of Appeals, Pet. at 2, n.1, nor are they raised in this Court by Petitioners.

Respondents raised three separate publications issues on appeal to the District of Columbia Circuit: (1) a facial challenge to the Bureau's criteria for the censorship of publications; (2) an "as applied" challenge to the Bureau's censorship of the forty-six individual publications; and (3) a challenge to the Bureau's practice of censoring an entire publication on the basis of a single objectionable page or article.

The Court of Appeals held that the Procunier v. Martinez, 416 U.S. 396 (1974), test was the appropriate standard for determining the constitutionality of the issues that the appeal raised.[4] The Court below reached this conclusion because both Martinez and this case implicated the interests of nonprisoners in communication

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[4] For the reasons stated at 18-21, infra, Respondents disagree with the claim in the Petition's Statement of Facts that the Martinez standard is a strict scrutiny standard.

by written means with individual prisoners and because both cases involved censorship on the basis of viewpoint. P.A. at 7a-8a and 14a. The Court of Appeals reviewed Turner v. Safley, ___U.S.___, 107 S.Ct. 2254 (decided on June 1, 1987) and determined that neither Turner, P.A. at 8a, n.1, nor any prior Supreme Court cases including Pell v. Procunier; Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); and Bell v. Wolfish, 441 U.S. 520 (1979) were applicable. P.A. at 10a-13a.

Applying Martinez to the facial validity of the regulations, the Court of Appeals concluded that Martinez required "a causal nexus between expression and proscripted (sic) conduct" and therefore held that if publications were found to "encourage" violence or other breaches of security the regulation "could survive the minimum Martinez tests." P.A. at 14a. In

contrast, the Court determined that regulations banning material that was deemed "detrimental to security, good order, or discipline," that "might facilitate criminal activity," or that merely "depicts," "describes" or "instructs in" prohibited activities, "permit[ted] a far looser causal nexus" than Martinez would allow. P.A. at 15a-16a. The Court of Appeals also held that the Bureau practice of rejecting an entire publication, when only a portion was deemed objectionable, failed to meet the second prong of the Martinez test. P.A. at 17a.

The Court below also held that the district court improperly failed to address the merits of the censorship of the forty-six publications. "[T]he rejections should have been addressed individually and none upheld unless consistent with Martinez." P.A. at 20a-21a. The Court also noted that the publication rejections occurred as

early as 1977, and that at the time of trial in 1983 there was evidence that the Bureau had changed its opinion with respect to the reading by prisoners of some of this material;[5] it suggested that in the first instance the district court should determine "whether and to what extent individual rejections are moot." P.A. at 21a.

REASONS FOR DENYING THE PETITION FOR THE WRIT OF CERTIORARI

I. BECAUSE THE JUDGMENT REQUIRES FURTHER PROCEEDINGS ON REMAND, A GRANT OF CERTIORARI IS INAPPROPRIATE

The Court of Appeals' decision required the district court on remand to apply the Martinez test to each of the rejected publications. Further, the district court was directed to determine which publications the Bureau would permit

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[5] There was also substantial evidence that there had never been any justification for the censorship of some items. See n.6, below.

its prisoners to receive.[6] As to those the

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[6] The Court of Appeals noted that defendants' witnesses testified at trial in 1983 that some publications would not then be rejected. P.A. at 21a. Indeed, the record demonstrates (much of it based on defendants' own testimony) that some publications did not pose a threat to prison security even at the time of the initial rejection. For example:

(1) Win Magazine, a leftist political periodical (May 5, 1981 issue) (P-Exh. 101, A-214-243), was rejected at Leavenworth on the ground that the content of one article "depicts, describes or encourages activities which may lead to [the] use of physical violence or group disruption." P-Exh. 99, A-207; Henderson T.1150Q, A-369. The Regional Director admitted that although the article criticized the prison industries program at Leavenworth, the criticism in itself was not enough to exclude it, and therefore, the publication would be allowed into every federal prison in the region, which includes the federal penitentiaries of Marion, Terre Haute, and Leavenworth. T.1150.

(2) The Call, a leftist political newspaper (issue of March 21, 1977) (P-Exh. 15, A-132-139), was rejected from Marion because "it has a tendency to glorify problem inmates, homosexuals and prison unions which have caused problems to inmates and staff." Adm. 575, 582; P-Exh. 15, A-131. The prison officials conceded that this issue was not a threat to

prison security. Wilkinson Dep. 20-21; Williams Dep. 133-134, A-311-312. The Regional Director acknowledged that he did not have any problem with the references to strikes, fasts, prisoner resistance, or struggle against oppression. Henderson Dep. 80, A-288. The Director of the Bureau, Norman Carlson, stated that he would not support exclusion of The Call from Marion today. Carlson Dep. 96, A-277.

(3) The Guardian, a leftist political newspaper (issue of March 30, 1977) (P-Exh. 47, A-180-181), was rejected from Marion because the publication "promoted the formation of prisoner unions and an adversary attitude toward staff." Adm. 695, 696). The officials who rejected the publication acknowledged that this issue, in fact, was not detrimental to security. Williams Dep. 106-108, A-307-309; Cripe Dep. (II) 87, A-281.

(4) The Labyrinth, a leftist prisoner-oriented periodical (issue of April 1977) (P-Exh. 18, A-148-155), was rejected from the Atlanta Penitentiary because it was "inflammatory," Adm. 772, and from Marion because the article criticizing prison medical care entitled "Medical Murder" was "slanted." Williams Dep. 121, A-310. The Warden at the Marion Penitentiary conceded that the publication was improperly rejected. Wilkinson Dep. 34-35, A-318-319. The Regional Director testified that the issue was

Bureau would permit there is no continuing controversy between the parties; clearly,

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acceptable. Henderson Dep. 76.

(5) Join Hands, a leftist political newspaper (Oct./Nov., 1976) (P-Exh. 22, A-156-163), was rejected from the Atlanta Penitentiary because it was "inflammatory," Todd Dep. 30-31; "advocates homosexuality," Adm. 760, 765, A-261, 263, or "advocates a prohibited act," McCune Dep. 59; T.1063, A-368. Lewisburg Penitentiary officials reviewed the magazine and said it was acceptable. Naves Dep. 129-130, A-293-294. Director Carlson testified that most Bureau institutions would allow inmates to read this issue and "it surely is not as much of a threat as some of the homosexual publications." Carlson Dep. 91, A-278.

(6) Worker's World, a weekly newspaper of the Worker's World Party (April 15, 1977) (P-Exh. 105, A-244-246), was rejected from the Marion Penitentiary on the ground that it "supports the gay rights of inmates and rebellion and boycotting by inmates as a legitimate means of achieving goals." Adm. 934; Cripe Dep. (II) 97-98. The General Counsel who had affirmed rejection of this newspaper admitted that there was nothing in it that supported the reasons given for its rejection and there was no portion of it that he could identify as objectionable. Cripe Dep. (II) 95-96.

some portion of the case is moot. Moreover, a remand is necessary in order to have the district court apply the appropriate test to the remaining legal issues. After the district court has applied the appropriate standards to the publications on remand it will be far easier to assess the extent to which there is any continuing controversy between the parties. It will also be far easier to assess the concrete impact of applying Martinez standards to current censorship of publications under Bureau regulations.

As a result of the remand order, this case is simply not ripe for review by means of certiorari. In Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R., 389 U.S. 327 (1967) this Court held certiorari inappropriate on ripeness grounds. The case involved a labor dispute in which a union was held in contempt for violating the injunction. On appeal the

case was remanded "to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.'" Id. at 328. See also Hamilton-Brown Shoe Co. v. Wolf Brothers and Co., 240 U.S. 251, 257-258 (1916).

This is not merely a theoretical point. In evaluating the propriety of a restriction on speech, the actual sweep of the restriction and its effect on expressive activity may be essential to the analysis. See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972) (determining whether Georgia breach of the peace statute was overbroad by reference to reported state cases applying statute to specific spoken words). Here, where so much of Respondents' case rests on the application

of regulations, this Court's review of the issues will be unnecessarily abstract until the district court has applied the ruling of the Court of Appeals.

II. THE DECISION OF THE COURT BELOW IS NOT IN DIRECT CONFLICT WITH A DECISION OF ANY OTHER COURT OF APPEALS

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions among the federal courts of appeals. Hence, the existence of an irreconcilable conflict among the circuits on a matter of federal law is ordinarily enough to secure review. See, e.g., Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559 (1968); Northeastern National Bank v. United States, 387 U.S. 213, 217 (1967).

In this case, the existence of a conflict of this nature is conspicuously absent. The Petition effectively concedes as much by its failure to cite a single

case from a court of appeals that is inconsistent with the holding of the Court below. In fact, the courts of appeals that have confronted the issue to date have been remarkably uniform in their recognition that Procunier v. Martinez establishes the controlling standard for censorship of publications in the prison context. No fewer than nine circuit courts have applied the standard set forth in Martinez to cases reviewing restrictions on inmates' freedom to read books and magazines. See 16-18 infra. Indeed, among them are two post-Turner decisions that have followed the lead of the District of Columbia Circuit in confirming the continuing precedential validity of the Martinez case in this context. Lawson v. Dugger, ___ F.2d ___ No. 86-5774 (11th Cir. December 21, 1987) reh. den. ___ F.2d ___ (March 3, 1988) (Slip Opinions lodged with Court);

Valiant-Bey v. Morris, 829 F.2d 1441 (8th Cir. 1987).

The issue in Lawson was whether state prisoners in Florida could receive literature published by a religious organization called the Hebrew Israel Faith, and directed at Black Americans. The prison officials sought to justify its banning the literature by claiming that it was racist and engendered violence among inmates.

Distinguishing Turner on the ground that the case before it "concerns more than 'prisoners' rights'; it also concerns the First Amendment rights of the [religious organization]," the court held that Martinez supplied the applicable standard of review for content-based restrictions. Id. at 2085. (See March 3, 1988 Slip Opinion.)

In Valiant-Bey v. Morris, 829 F.2d at 1443, the Eighth Circuit reversed a

judgment on the pleadings in favor of the defendant prison officials on plaintiffs' claim arising from the confiscation of his religious materials, and remanded the case to the district court to evaluate the defendants' decision under the standards announced in Martinez. Id. at 1443-1444.

Pre-Turner decisions also require compliance with the Martinez standard for content-based restrictions on prisoners' right to read. See Murphy v. Missouri Department of Corrections, 814 F.2d 1252, 1256 (8th Cir. 1987); Brooks v. Seiter, 779 F.2d 1177, 1180-81 (6th Cir. 1985); Dooley v. Quick, 598 F.Supp. 607, 620-622 (D.R.I. 1984), aff'd 787 F.2d 579 (1st Cir. 1986); Pepperling v. Crist, 678 F.2d 787, 790 (9th Cir. 1982); Guajardo v. Estelle, 580 F.2d 748, 760-762 (5th Cir. 1978); Hopkins v. Collins, 548 F.2d 503, 504-505 (4th Cir. 1977); Aikens v. Jenkins, 534 F.2d 751, 755 (7th Cir. 1976); and Morgan v. LaVallee,

526 F.2d 221, 224-225 (2d Cir. 1975).

If a lack of uniformity on a question of law among the circuits is a factor in the exercise of certiorari jurisdiction, then certainly the converse is true where, as here, the Court is confronted with unanimity among the courts of appeals. Under these circumstances, prudential considerations counsel against the grant of certiorari and the Petition should be denied.

III. THE COURT BELOW CORRECTLY APPLIED MARTINEZ

A. The Martinez Standard Is Not a Strict Scrutiny Standard

Throughout the Statement of Facts and argument, Petitioner states that the Court of Appeals applied a "strict scrutiny" standard. See, e.g., Pet. at 1, 2, 8, 9, 10. "Strict scrutiny," a term derived in the first instance from equal

protection analysis,[7] is sometimes used in First Amendment cases to denote the most stringent standard of review, a standard that requires that governmental restrictions be justified by a showing of a "compelling interest" or a "clear and present danger." See, e.g., Arkansas Writers' Project, Inc. v. Ragland, ___ U.S. ___, 107 S.Ct. 1722, 1731-1732 (1987) (Scalia, J., dissenting); Munro v. Socialist Workers Party, ___ U.S. ___, 107 S.Ct. 533, 542-543 (1986) (Marshall, J., dissenting); Levine v. United States District Court for the Central District of California, 764 F.2d 590, 595 (9th Cir. 1985), cert. den., ___ U.S. ___, 106 S.Ct. 2276 (1986).

The Procunier v. Martinez standard relied on by the Court of Appeals

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7 See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (holding statutory exclusion of aliens not subject to strict scrutiny for equal protection purposes).

is not a strict scrutiny standard. The Martinez Court began by noting that the lower courts had proposed a variety of standards for reviewing prison regulations restricting freedom of speech, ranging from a complete "hands-off" deference approach to a "compelling state interest" or "clear and present danger" test. 416 U.S. at 407-408. The Court also noted the "intermediate position" that a "regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose." Martinez at 408, quoting Carrothers v. Follette, 314 F.Supp. 1014, 1024 (S.D.N.Y. 1970). The standard adopted in Martinez requires that the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of

expression and the restriction must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Id. at 413-414.[8] Significantly, this standard is essentially equivalent to the Carrothers intermediate standard. This is a balanced approach that recognizes both the rights that free citizens must retain to communicate with prisoners and the legitimate security concerns of prison administrators.

B. Turner Does Not Disturb the Applicability of the Martinez Standard

In Turner v. Safley, this Court last term considered a challenge to the inmate-to-inmate correspondence and

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8 The Martinez test is derived in large measure from United States v. O'Brien, 391 U.S. 367 (1968), which rejected a challenge to a federal statute prohibiting the burning of draft cards. The O'Brien standard was formulated to test incidental restrictions on free speech occasioned by the legitimate exercise of governmental power.

marriage regulations of the Missouri prison system. Nothing in Turner suggested that the authority of Martinez had been eroded. Rather, the Court declined to apply Martinez to the inmate-to-inmate correspondence issue because the regulation, unlike the regulations challenged in the instant case, did not cause "a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." Martinez at 409 quoted in Turner at 2260 (emphasis added in Turner).[9]

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9 The Court also found that it did not have to resolve whether the Martinez test applied to the marriage regulation because the regulation failed to meet even the reasonable relationship test. Turner at 2266.

Arguably, Martinez would not apply because a marriage ceremony, presumably involving some form of direct contact, raises security concerns similar to visits, so that the standards of Pell v. Procunier and Block v. Rutherford, 468 U.S. 576 (1984) apply. This case, unlike the marriage regulations deals solely with the regulation of pure First Amendment expression, unaccompanied by any conduct,

C. The Publisher Plaintiffs Have A "Particularized Interest" under Martinez in Communicating with Prisoners

In Martinez, the Court noted that persons corresponding with a prisoner had a particularized interest in that communication. 416 U.S. at 408. The Petition argues that the publisher plaintiffs here lack a comparable particularized interest in their prisoner audience. However, the publishers produce books, magazines, and newspapers for public consumption both inside and outside prison. These publications are mailed to particular named individual prisoners who have expressed an interest in reading them and in some cases have subscribed and paid for them.[10] Surely in the context of the

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on the basis of the content of the expression.

[10] Some publishers, like those who publish the Outlaw, offer their political publications free of charge to subscribers. However, all the publications involve individual mailings to prisoners who have requested receipt of the publication. Mass mailing cases might raise issues of prison security beyond those implicated in this case.

rights of the press, this is as "particularized" an "interest" as anyone could demand.

It is ironic that the Petition seeks a lower level of constitutional protection for newspapers and other publications than for personal correspondence. The history of the First Amendment makes it clear that the Founders' primary concern was to abolish restrictions on public discourse on matters of political and governmental concern--exactly the nature of the publications censored by the Bureau in this case. See generally Z. Chafee, Free Speech in the United States, 18-20 (1941).

D. The Court of Appeals' Application of Martinez Is Consistent with This Court's Public Forum Cases

The Petition argues that under

this Court's public forum cases, a standard lower than the Martinez standard applies. Pet. at 16-17. However, the Bureau censorship at issue is not viewpoint-neutral, so that the regulations and practices involved here do not meet the criteria the Court has established for regulation of expression even in non-public forums.

This Court has traditionally distinguished First Amendment challenges arising in public forums from First Amendment challenges that do not involve a public forum. In cases that do not involve a public forum, the Court has allowed content-related regulation in the sense that the Court has allowed the government to exclude all expression on certain topics. In such cases, however, the Court has been careful to require that governmental regulation be viewpoint-neutral in the sense that if any

communications are allowed on a particular topic, the restrictions cannot exclude particular communications on that topic on the basis of the viewpoint expressed. See, e.g., Perry Educational Ass'n. v. Perry Local Educators Ass'n., 460 U.S. 37, 46 (1983).

As the Petitioners conceded below[11] and as the Court of Appeals found,[12] the Bureau's regulations are not viewpoint-neutral. Examination of the censored publications shows that the regulations have been used to exclude unorthodox or unpopular viewpoints, particularly those that are most critical of the status quo of persons and institutions in power, including prison officials. For example, among the forty-six excluded publications was an article

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11 Appellee's Brief in the Court of Appeals at 33.

12 P.A. at 7a, 14a.

from a publication critical of health care provided to federal prisoners reporting on the facts that gave rise to Carlson v. Green, 446 U.S. 14 (1980).[13]

Because the regulations are not viewpoint-neutral, the predicates for applying non-public forum doctrine are not present. Cf. Pell v. Procunier, 417 U.S. at 828.

> So long as this restriction [on prison visitation] operates in a neutral fashion, without regard to the content of the expression, it falls within the "appropriate rules and regulations" to which "prisoners necessarily are subject" and does not abridge any First Amendment freedoms retained by prison inmates.

(Citation and footnote omitted)

Accordingly, the regulations at issue in this case do not satisfy the criteria for validity established in this Court's non-public forum cases.

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13 See n.6, example 4 (exclusion of The Labyrinth) (April, 1977).

IV. THE MARTINEZ TEST, HELD APPLICABLE BY THE COURT OF APPEALS, IS A BALANCED TEST THAT REQUIRES THE DISTRICT COURT ON REMAND TO CONSIDER THE BUREAU'S LEGITIMATE INTERESTS IN SECURITY, DISCIPLINE AND REHABILITATION

The Petition seriously misconstrues the test established in Martinez and as a result predicts dire consequences for prison security, order and the prevention of prison violence. As noted below, however, Martinez requires the consideration of "the substantial governmental interests [in] security, order and rehabilitation" in its first prong. Id. at 414. Justice Powell in Martinez, in the context of discussing these legitimate concerns, noted that

> [t]he case at hand arises in the context of prisons. One of the primary functions of government is the presentation of societal order through enforcement of the criminal law; and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline,

> the maintenance of institutional security against escapes or unauthorized entry...

Id. at 413.

Censorship, said the Court, would be justified in an effort to prevent escapes, proposed criminal activity, or the transmission of encoded messages. Id. at 414.[14] The Martinez standard accordingly incorporates an appropriate level of deference to prison security and other appropriate governmental interests.

The lower federal courts have had extensive experience in the application of the Martinez test over the previous fourteen years. There is simply no evidence that the application of Martinez has resulted in the entry of dangerous

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[14] Respondents have not challenged Bureau regulations prohibiting material that "depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;" "depicts or describes procedures to brewing alcoholic beverages or the manufacture of drugs" or "is written in code." See Pet. at 3-4, n.3.

publications or correspondence. In fact, a survey of the recent case law indicates several instances in which the courts have upheld prison censorship under the standards announced in Martinez.

In Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980), the court, applying the Martinez test, held that a regulation barring the reading by prisoners of publications that constituted an "immediate threat to the security of the institution" was not unconstitutional facially, or as applied, to a newsletter that approved of a prior inmate work stoppage by inmates at the prison. Id. at 570-575. Accord: Espinoza v. Wilson, 814 F.2d 1093 (6th Cir. 1987) (ban on reading of homosexual publication upheld on security grounds); Travis v. Norris, 805 F.2d 806 (8th Cir. 1986) (ban on publication entitled "Gorilla Law" upheld because it advocated violence); Carpenter v. State of South Dakota, 536

F.2d 759 (8th Cir. 1976) (exclusion of sexually explicit material). See also, Murphy v. Missouri Department of Corrections (upholding regulations under Martinez); Meadows v. Hopkins, 713 F.2d 206 (6th Cir. 1983) (upholding regulations under Martinez).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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